

No. 86-98

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IN THE

# Supreme Court of the United States

October Term, 1986

GREGORY L. RIVERA,

*Appellant,*

vs.

JEAN MARIE MINNICH,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

## BRIEF FOR APPELLANT

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i.

### **I. Question for Review**

Does the Pennsylvania statute which permits paternity to be determined only by a "preponderance of the evidence" violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

## BRIEF FOR APPELLANT

## IV. Opinions and Judgment Below

The Opinion of the Court of Common Pleas of Lancaster County, Pennsylvania, granting Appellant a new trial due to the unconstitutionality of the Pennsylvania Support Law is reported at *Minnich v. Rivera*, 69 Lancaster L.Rev. 329 (1984) and is Appendix B to the Jurisdictional Statement in this case. The Supreme Court of Pennsylvania reversed and found the statute to be constitutional. *Minnich v. Rivera*, 509 Pa. 588, 506 A.2d 879 (1986). This Opinion is Appendix C to the Jurisdictional Statement filed in this case.



### V. Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1257 (2), in that a Pennsylvania statute was found to be valid in the face of a constitutional challenge. The Pennsylvania Supreme Court decision was rendered March 21, 1986. A notice of appeal was filed in the Supreme Court of Pennsylvania on April 18, 1986 (Appendix A to Jurisdictional Statement). The case was docketed in the Supreme Court of the United States pursuant to this Court's Rule 12. The filing of the notice of appeal and the docketing of the case, including the filing of the Jurisdictional Statement, were completed within 90 days from the March 21, 1986 entry of the order of the Supreme Court of Pennsylvania.

### VI. Statutory and Constitutional Provisions

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." Fourteenth Amendment, Constitution of the United States.

"Where the paternity of a child born out of wedlock is disputed, the determination of paternity shall be made by the court without a jury unless either party demands trial by jury. The trial, whether or not trial by jury is demanded, shall be a civil trial and there shall be no right to a criminal trial on the issue of paternity. *The burden of proof shall be by a preponderance of the evidence.*" 42 Pa.C.S. §6704(g). (emphasis added)

On October 30, 1985, the Pennsylvania statute was repealed and replaced with the following, in which the operative language in this case was retained verbatim:

"Where the paternity of a child born out of wedlock is disputed, the determination of paternity shall be made by the court in a civil action without a jury unless either party demands trial by jury. *The burden of proof shall be by a preponderance of the evidence.*" 23 Pa.C.S. §4343(a) (Supp. 1986) (emphasis added)

## VII. Statement of the Case

Gregory L. Rivera, Appellant, is the Defendant in a child support case commenced June 17, 1983, by Jean Marie Minnich, Appellee. Appellant denied paternity and trial was scheduled before a jury on April 24, 1984. On April 13, 1984, Appellant filed a petition asking the court to declare that the burden of proof set by the Pennsylvania paternity statute violated Defendant's due process rights under the federal constitution (Jurisdictional Statement Appendix D).

The trial court issued a Rule against Appellee/Plaintiff to show cause why the burden of proof should not be set at proof by clear and convincing evidence. Appellee filed an answer in opposition to the Rule. The trial court then reserved its ruling on the burden of proof issue. At the close of testimony, Appellant's petition was denied. The jury found in favor of Appellee/Plaintiff.

The record of the trial is found at docket entry number 21. All page numbers herein are referenced to the page of the transcript of the trial at which the testimony referred to may be found. Appellee testified that she had sex with Appellant two to three times in the Summer of 1982 (p. 23). The one time she described took place in Appellant's van outside his place of employment during a work break (pp. 23-24). Appellant was 15 years old during the time the child in question was conceived (p. 30) and 16 at the time of testimony (p. 19). Appellant was never contacted during the pregnancy about the existence of the child (p. 26). Appellant paid no support and had no contact with Appellee (p. 27). The support proceedings and consequently the paternity determination did not begin until Appellee began to receive welfare benefits (pp. 30, 31, 47). If Appellee had not named a father, her public assistance would have been terminated (p. 47). The child was given Appellee's last name rather than Appellant's (p. 31).

Plaintiff's attorney was permitted to show the child, the Appellee and the Appellant standing together to "see if the jury sees any physical resemblance." (p. 33).

Appellee's sister, age 19, testified that Appellee and Appellant had sex (p. 40). She further testified that Appellant's brother Chris was in the van and that she had sex with him while her sister and Appellant were having sex (p. 41).

Christopher L. Rivera, brother of Appellant, testified that he received a court order to have a blood test in regard to the paternity determination at issue in this case and that he refused to cooperate (pp. 51-54).

Appellant testified that he had sex with Appellee (pp. 59, 62). He further testified that Appellee and his brother Chris were alone in the back of the van together, that they had the opportunity to have sex (pp. 63, 64).

Maria Rivera, sister of Appellant testified that Appellee informed her that Gregory Rivera was not the father of the child in question (p. 67).

Appellant filed a motion for new trial alleging, in part, that it was error for the trial court to have denied Appellant's petition seeking a declaration that the burden of proof by a preponderance of the evidence violated his due process rights under the federal constitution. (Jurisdictional Statement, Appendix E).

Appellant's motion for a new trial was granted October 19, 1984 on the ground that 42 Pa.C.S. §6704(g) (now 23 Pa.C.S. §4343(a) (Supp. 1986)) violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because the state statute fails to require proof of paternity by at least "clear and convincing" evidence (Jurisdictional Statement, Appendix B).

### VIII. Summary of Argument

The burden of proof in paternity actions has been set by the Pennsylvania legislature at proof by a preponderance of the evidence. The authority of the Commonwealth to set a burden of proof is limited by the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Due Process requires a higher burden of proof—that of proof by clear and convincing evidence.

Weighing the relevant factors, imposition of a parental relationship calls for the higher burden of proof. The private interests affected are substantial—in terms of liberty, money and emotions. A potential for imprisonment follows from a determination of paternity. The risk of error is peculiarly great in this area due to the nature of the evidence, including blood tests. The governmental interest supports using the higher burden of proof, in that the government is interested in assuring that the correct person is identified as the father.

Termination of a parental relationship requires proof by clear and convincing evidence. There is no constitutionally significant difference between termination and creation of a parental relationship. Therefore, creation of a parental relationship also requires proof by clear and convincing evidence. This burden of proof is one which the state courts commonly employ in numerous, often less serious, forms of civil actions.

Evaluation of the entire statutory scheme for a determination of paternity supports this conclusion. The paternity hearing provides the sole opportunity for controverting the mother's allegations.

### IX. ARGUMENT

A. The consequences of a determination of paternity are substantial.

The imposition of parental obligations by a determination of paternity involves substantial legal consequences in Pennsylvania. The determination itself is final and may not be relitigated. *Norris v. Beck*, 282 Pa.Super. 420, 422 A.2d 1363 (1980).

First, a parent is liable for the support of unemancipated children 18 years of age or younger and may be liable for the support of a child over 18. 23 Pa.C.S. §43231 (Supp. 1986). *Emerick v. Emerick*, 445 Pa. 428, 284 A.2d 682 (1971); *Verna v. Verna*, 288 Pa.Super. 511, 422 A.2d 630 (1981). All of a parent's net income and assets may be considered in entering an order for support, regardless of their source. 23 Pa.C.S. §4322 (Supp. 1986); *Butler v. Butler*, 339 Pa.Super. 312, 488 A.2d 1141 (1985).

If the court determines that health care coverage is available as a benefit of employment at no cost or at a reasonable cost, a parent may be ordered to provide it. Additionally, the parent may be required to pay a percentage of reasonable and necessary health care expenses. 23 Pa.C.S. §4324 (Supp. 1986); 42 U.S.C. §652(f). A child is eligible for workmen's compensation benefits through the parent, 77 P.S. §562. The support obligation continues without reference to the amount of time a child spends with a parent. *Melzer v. Witsberger*, 505 Pa. 462, 472 n.6, 480 A.2d 991, 996 (1984).

Second, imposition of parental status may lead to significant interference in the new parent's financial affairs. A parent who fails to comply with the support order may have his wages, salary or commissions



attached. Pa.R.Civ.P. 1910.22; 23 Pa.C.S. §4348 (Supp. 1986). A 10 percent penalty may be imposed by the court for any amount in arrears in excess of 30 days, upon the finding that the failure to pay was willful. 23 Pa.C.S. §4348(c) (Supp. 1986). Any income tax refunds, both state and federal, are subject to being confiscated to pay child support arrearages. 42 U.S.C. §664; 23 Pa.C.S. §4307 (Supp. 1986). Information regarding the amount of arrears may be provided to "any consumer credit bureau organization upon the request of the organization." 23 Pa.C.S. §4303(a) (Supp. 1986). A person subject to a Court order is thereafter obligated to report changes in employment and home address to the court, under penalty of contempt proceedings. 23 Pa.C.S. §4353 (Supp. 1986).

Third, where there is a failure to pay a support order, there also is a substantial potential for deprivation of physical liberty. 23 Pa.C.S. §4345 (Supp. 1986) provides:

"(a) General Rule—A person who willfully fails to comply with any order under this chapter, except an order subject to section 4344 (relating to contempt for failure of obligor to appear), may, as prescribed by general rule, be adjudged in contempt. Contempt shall be punishable by any one or more of the following:

(1) Imprisonment for a period not to exceed six months.

(2) A fine not to exceed \$500.

(3) Probation for a period not to exceed six months.

(b) Condition For Release—An order committing a defendant to jail under this section shall specify the condition the fulfillment of which will result in the release of the obligor."

The procedural rules for civil contempt are set out in Pa.R.Civ.P. 1910.21.

Fourth, the paternity finding can lead to criminal liability for failure to pay support. 18 Pa.C.S. §4304 provides: "*a parent, guardian, or other person supervising the welfare of a child under 18 years of age commits a misdemeanor of the second degree if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.*" (emphasis added). A misdemeanor of the second degree is punishable by a sentence of imprisonment up to two years, 18 Pa.C.S. §1104, and a fine of up to \$5,000, 18 Pa.C.S. §1101. The Governor of Pennsylvania may extradite persons where a criminal charge is pending involving failure to provide support. 23 Pa.C.S. §4505. When a support order is entered in a Protection From Abuse action, willful noncompliance may cause imprisonment for up to six months and a \$1,000 fine. 35 P.S. §§10186(a)(5) and 10190.

Fifth, one found to be a parent is obliged to provide medical care for a child, even over religious objections. *Commonwealth v. Barnhart*, 345 Pa.Super. 10, 497 A.2d 616 (1985).

Sixth, a determination of paternity may result in the child having rights in the father's estate through the laws of intestacy. 20 Pa.C.S. §2107(c). A child born out of wedlock must prove his right to share in the father's estate by "clear and convincing" evidence unless there is "a prior determination of paternity." 20 Pa.C.S. §2107(c)(3). That prior paternity determination, however, need only be by a "preponderance of the evidence". 22 Pa. C.S. §4343(a) (Supp. 1986). See also, 20 Pa.C.S. §§2514(8), 3538 and 6114(5).

A child born out of wedlock generally has all the rights and privileges of a child born during wedlock. 48 P.S. §167. All of a parent's real and personal property is liable for assistance provided to his unemancipated minor children "incurred by any public body or public agency." 62 P.S. §1974.

**B. Due process requires that a finding of paternity be supported by clear and convincing evidence.**

"To experienced lawyers, it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." *Speiser v. Randall*, 357 U.S. 513, 520-521 (1958).

While it may be true that "the ultimate truth as to how the standards of proof affect decision making may well be unknowable," (*Addington v. Texas*, 441 U.S. 418, 424-425 (1979)) at least use of the clear and convincing standard precludes a determination of paternity based on a finding that in the scales of evidence, the scales tipped "ever so slightly or to the slightest degree" in favor of one party. Pennsylvania Standard Jury Instructions (Civil) at Section 5.50 (copy attached).

Appellant concedes that determination of paternity by the preponderance of the evidence is the general rule in the United States, New York being a notable exception. *Rebmann v. Muldoon*, 23 A.D.2d 163, 259 N.Y.S.2d 257 (1965); *E.E. v. F.F.*, 106 A.D.2d 694, 483 N.Y.S.2d 748 (1984). The Supreme Court of Pennsylvania stated:

"A majority of the courts which have considered the quantum of evidence issue in the 'civil trial' jurisdictions, have affirmed the preponderance standard." *Minnich v. Rivera*, 509 Pa. 588, 596, 506 A.2d 879 (1986).

A review of the cases cited by the Pennsylvania Supreme Court in *Minnich* reveals, however, that not one of those cases analyzed the burden of proof issue in the context of the United States Constitution; in most of them, there was no challenge to the use of the standard. The issue presented in the instant case has not been presented or considered in any other case, to the best of counsel's knowledge.

From an historical perspective, a stricter standard is appropriate—conceivably even proof beyond a reasonable doubt. Paternity determinations were made exclusively through the criminal justice system in Pennsylvania from colonial times through 1963. From 1963 until 1978, both criminal and civil proceedings were available to determine the paternity of illegitimate children. The Pennsylvania criminal statute through which paternity could be determined (Act of June 24, 1939, June 24, P.L. 872, Section 732, 18 P.S. §4732), was repealed effective June 27, 1978. Act of April 28, 1978, P.L. 106, No. 46. Since 1978, a civil proceeding is the exclusive method for determination of paternity in Pennsylvania. 23 Pa.C.S. §4341 *et seq.* *Mansfield v. Lopez*, 288 Pa.Super. 567, 573 n.4, 432 A.2d 1016, 1019-1020 n.4 (1981); *Com. ex rel. Miller v. Dillworth*, 204 Pa.Super. 420, 205 A.2d 111 (1964).

The state may set and revise burdens of proof, but only within the requirements of due process, pursuant to the Fourteenth Amendment to the United States Constitution.

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of



factual conclusions for a particular type of adjudication'." *Addington v. Texas*, 441 U.S. 418, 423 (1979).

Three factors must be evaluated to determine the standard of proof required in paternity actions by the Due Process Clause.

"[F]irst, the private interest that will be affected the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safe guards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

First, analysis of the private interests involved mandates use of the clear and convincing standard. The determination of paternity is irreversible. *Norris v. Beck*, 282 Pa.Super. 420 (1980). The consequences of such a determination are reviewed at length in Section IX (A) of this Brief. An intermediate burden of proof is required because the "individual interests at stake" are far more substantial than the mere loss of money. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). The analysis of the importance of the parent-child relationship set out in *Santosky v. Kramer*, 455 U.S. 745 (1982), applies with equal force in our case. Paternity proceedings are simply the reverse of the termination of parental rights proceedings considered in *Santosky*. There is no constitutionally significant difference.

"The private interests implicated here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the

creation of a parent-child relationship. This Court frequently has stressed the familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. [citation omitted] Just as the termination of such bonds demands procedural fairness. [citation omitted] so to does their imposition. Through the judicial process, the state properly endeavors to identify the father of a child born out of wedlock and to make him responsible for the child's maintenance. Obviously, *both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination.*" *Little v. Streater*, 452 U.S. 1, 13 (1981) (emphasis added).

The mother of the child and the state have an interest in identifying the actual father of the child and holding him responsible, but have no interest in an erroneous decision on that issue. The child has a heightened interest in a correct paternity determination in order to obtain correct genetic and medical history through the proper father. The child has emotional and psychological needs to know their true parents. *J.H. v. M.H.*, 177 N.J. Super. 436, 426 A.2d 1073 (1980). The state similarly has a heightened interest in a correct determination because:

"It is furthermore clear that the state's future administrative burdens would be lessened since a correct determination of paternity increases the chance that the adjudged parent will comply with support obligations." *Corra v. Coll*, 305 Pa.Super. 179, 193, 451 A.2d 480, 488 (1982).

The second factor, the risk of error in the decision, especially supports a heightened burden of proof in these cases. Evidence in paternity cases consists of blood test results and the traditional testimony of the persons involved. The use of blood tests to provide evidence of probability that the defendant is the father of the child in question is a relatively recent development.

HLA blood tests are conducted with blood samples obtained from the mother of the child and the putative father. Up to 62 blood typing procedures may be employed to determine common genetic factors between putative parent and child. Once the blood grouping, or genetic markers, are obtained, the results are statistically manipulated in two fashions—first by use of statistical studies for the frequency of genetic factors in various ethnic groups and second with a probability formula. That probability formula “assumes that there is a 50 percent chance that the defendant and mother had intercourse and that the defendant is indeed the father of the child . . . the 50 percent assumption has no scientific basis, but is employed precisely because nothing is known about whether intercourse actually took place between the parties at a time when conception could have occurred.” *Everett v. Everett*, 150 Cal. App.2d 1053, 201 Cal. Rptr. 351 (1984). If the 50 percent assumption was replaced with a different percentage, the probability of paternity would vary considerably.

In the instant case, Appellant attempted to show that his brother also had sex with Appellee. HLA blood tests might not exclude an alleged father who would have been excluded by red blood cell tests if the alleged father and the real father are related. *Turek v. Hardy*, 312 Pa.Super. 158, 161, 458 A.2d 562, 564 (1983). For examples of the complexity of employment of these tests in the disputed paternity case see *Everett v. Everett*, 150 Cal. App.3d 1053, 201 Cal. Rptr. 351, 360 (1984), and “Admissibility, Weight and Sufficiency of Human Leukocyte Antigen (HLA) Tissue Typing Tests in Paternity Cases.” Annot., 37 ALR 4th 167 (1985).

“The proper evidentiary weight to be given to these techniques is still a matter of academic dispute.” *Mills v. Habluetzel*, 456 U.S. 91, 98 (1982).

In Pennsylvania, the blood tests have been held to be admissible only as “some evidence of paternity.” *Turek v. Hardy*, 312 Pa.Super. 158, 458 A.2d 562 (1983). *Mills* makes clear the continued importance of the more traditional types of evidence in contested paternity cases. This type of evidence has been described time and time again as problematic. In *Little v. Streater*, 452 U.S. 1 (1981), this Court cited with approval an earlier opinion of Justice Brennan while he was a member of the New Jersey Superior Court:

“[I]n the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence, or worse, induce deliberate falsity.” 452 U.S. 1, 9 (1981).

In the same portion of the opinion, the Court noted with approval a statement from a legal journal that the testimony of a party is of questionable reliability and they are seldom accurate or reliable eyewitnesses. *Id.*, 452 U.S. at 8.

The third *Mathews* factor is the government's interest in the chosen standard of proof. The government has no reasonable interest in avoiding the use of the intermediate standard of proof in paternity cases. The use of a higher standard of proof imposes no costs or burdens beyond that which already exist. A heightened burden of proof will not require additional hearings or expense and will not slow down the determination of the issues raised.

This Court is not being asked to create a new burden of proof requiring substantial federal intervention into the operation of paternity hearings. As described in the opinion of the Supreme Court of Pennsylvania, the clear and convincing standard is already well established. *Minnich v. Rivera*, 509 Pa. 588, 595 (1986). Throughout



the United States, a clear and convincing standard of proof is employed in numerous forms of civil actions. 9 *Wigmore*, *Evidence* Section 2498.

In Pennsylvania "clear and convincing" evidence is required to prove *inter alia*: a change of domicile, *McKenna v. McKenna*, 282 Pa.Super. 45, 422 A.2d 668 (1980); a claim for wages for personal services to a decedent, *Mooney's Estate*, 328 Pa. 273, 194 Atl. 893 (1937); fraud, *Gilberti v. Coraopolis Trust Company*, 342 Pa. 161, 19 A.2d 408 (1941); entitlement to reformation of a contract on grounds of mistake, *Boyertown National Bank v. Hartman*, 147 Pa. 558, 23 Atl. 842 (1892); entitlement to a resulting trust, *Hale v. Stirling*, 369 Pa. 336, 85 A.2d 849 (1952); title by adverse possession, *Stevenson v. Stine*, 412 Pa. 478, 195 A.2d 268 (1963); facts necessary to overcome the presumption of a gift, *Butler v. Butler*, 464 Pa. 522, 347 A.2d 477 (1975); and incompetency sufficient to cause rescission of a transaction, *Elliott v. Clausen*, 416 Pa. 34, 204 A.2d 272 (1964). The meaning of the clear and convincing standard of proof recently was analyzed by the Pennsylvania Supreme Court in *In Re: Adoption of J.J.*, \_\_\_\_ Pa. \_\_\_\_, 515 A.2d 883 (1986). There, although the basis for employing the clear and convincing evidence was set in the federal constitution, the court disposed of the matter on state law grounds regarding the meaning of clear and convincing evidence. In all of the listed cases, the magnitude of the interest implicated does not rise to the magnitude of the parent-child relationship.

C. The deficiency of the burden of proof provided by statute is not cured by the statutory scheme for a determination of paternity.

The determination of paternity in the context of a support action is governed by 23 Pa.C.S. §4341 *et seq.* and Pennsylvania Rules of Civil Procedure 1910.1 *et seq.* An action for support is commenced by filing a complaint with the Domestic Relations Section of the Court of Common Pleas. Pa.R.Civ.P. 1910.4. An office conference is scheduled by court order. Pa.R.Civ.P. 1910(c). Service is made by mail. Pa.R.Civ.P. 411. At the support conference before a Domestic Relations officer the defendant may deny paternity. Pa.R.Civ.P. 1910.15(b) provides:

"If the reputed father does not execute an acknowledgment of paternity, the domestic relations officer shall terminate the conference. He shall advise the parties that there will be a trial without jury on the issue of paternity unless within ten days after the conference either party demands a trial by jury as provided by Rule 1910.28(b)."

The Pa.R.Civ.P. 1910.28(b) notice is set out in its entirety in the Joint Appendix, pages 6-8.

In *Corra v. Coll*, 305 Pa.Super. 179, 451 A.2d 480 (1982), the Pennsylvania Superior Court held that an indigent defendant in a paternity action is entitled to a free lawyer. *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981), requires that the state provide indigent paternity defendants with blood tests without prepayment of the costs attendant thereto.

The putative father/defendant is prohibited in Pennsylvania by rule of court, from engaging in any pre-trial discovery, unless he can obtain a special order of court. Pa.R.Civ.P. 1910.9.

The plaintiff in paternity actions is represented by the District Attorney. 23 Pa.C.S. §4306 (Supp. 1986).

The federal government has assumed a substantial role with regard to child support under 42 U.S.C. §601 *et seq.*, Title IV—Part D of the Social Security Act, entitled Child Support and Establishment of Paternity. This is popularly known as "the IV-D Program." By legislative act, the federal government is substantially involved with each and every facet of obtaining and enforcing support orders. The federal government provides substantial funds, information, and technical assistance to the states, all of which is conditioned upon meeting a complex system of requirements. The IV-D Program regulations are found at 45 C.F.R. §301 *et seq.*

In *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), the majority decision explicitly rejected analysis of the burden of proof in proceedings for termination of parental rights in the context of the complete statutory scheme therefor:

"For this reason, we reject the suggestions of respondent and the dissent that the constitutionality of New York's statutory procedures must be evaluated as a 'package.' Indeed, we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous assessment of the 'cumulative effect' of state procedures .... The statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts." 455 U.S. at 757 n.9.

In the instant case, examination of the "'cumulative effect' of state procedures" for determination of paternity supports employment of the clear and

convincing standard. The paternity proceeding at issue in the instant case is resolved in one hearing. Unlike the termination proceedings fully described in the *Santosky* dissent, there is no lengthy review, investigation and continuing judicial review. The entire determination rises or falls on one hearing. Even with counsel, the defendant is presented with two kinds of problematical evidence. The first, blood tests, provides the results of matching blood characteristics of the mother, child and putative father. Those results are then manipulated statistically.

"The proper evidentiary weight to be given to these techniques is still a matter of academic dispute." *Mills v. Habluetzel*, 456 U.S. 91, 98 n.4 (1982).

In Pennsylvania, the blood tests have been held to be admissible as only "some evidence of paternity." *Turek v. Hardy*, 312 Pa.Super. 158, 458 A.2d 562 (1983).

The second kind of evidence also is difficult for the factfinder to evaluate:

"[I]n the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity." *Cortese v. Cortese*, 10 N.J. Super. 152, 156, 76 A.2d 717, 719 (1950), as quoted in *Little v. Streater*, 452 U.S. 1, 8, 68 L.Ed.2d 672, 634 (1981).

Since a determination of paternity cannot be relitigated in Pennsylvania (*Norris v. Beck*, 282 Pa.Super. 420, 422 A.2d 1363 (1980)), it is doubly important that the primary functions of the burden of proof, as noted in both the majority and the dissenting opinions in *Santosky v. Kramer*, be served. The *Santosky* dissent states:

"[The] standard of proof is a crucial component of legal process, the primary function of which is 'to minimize the risk of erroneous decisions.'" 455 U.S. at 785.

The majority opinion of the Court states:

"But only the standard of proof 'instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions' he draws from that information." 455 U.S. at 757 n.9.

### X. Conclusion

The decision of the trial court awarding Appellants a new trial at which the Plaintiff's burden of proof would be by clear and convincing evidence should be reinstated.

Respectfully submitted,

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## Pennsylvania Standard Jury Instructions (Civil) at Section 5.50

5.50

### 5.50 (Civ) BURDEN OF PROOF

In civil cases such as this one, the plaintiff has the burden of proving those contentions which entitle him to relief.

When a party has the burden of proof on a particular issue, his contention on that issue must be established by a fair preponderance of the evidence. The evidence establishes a contention by a fair preponderance of the evidence if you are persuaded that it is more probably accurate and true than not.

To put it another way, think, if you will, of an ordinary balance scale, with a pan on each side. Onto one side of the scale, place all of the evidence favorable to the plaintiff; onto the other, place all of the evidence favorable to the defendant. If, after considering the comparable weight of the evidence, you feel that the scales tip, ever so slightly or to the slightest degree, in favor of the plaintiff, your verdict must be for the plaintiff. If the scales tip in favor of the defendant, or are equally balanced, your verdict must be for the defendant.

In this case, the plaintiff has the burden of proving the following propositions: [In the ordinary negligence case;] that the defendant was negligent, and that that negligence was a substantial factor in bringing about the accident. [In other cases, the contentions should be listed seriatim.] If, after considering all of the evidence, you feel persuaded that these propositions are more probably true than not true, your verdict must be for the plaintiff. Otherwise, your verdict should be for the defendant.

### SUBCOMMITTEE NOTE

Although the plaintiff has the burden of proving his case against the defendant, the defendant has the burden of proving all affirmative defenses. E.g., contributory negligence, see note to Section 3.03. It is error for a trial judge to charge a jury that the plaintiff is obliged to show a case which is free from contributory negligence because of the burden of proof which the defendant has of establishing this affirmative defense. *Brown v. Jones*, 404 Pa. 513, 172 A.2d 831 (1961).